

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JUSTIN AND ANGELA PACUSKA,

Plaintiff,

v.

ALLIED VAN LINES, INC.,

Defendant.

Case No. 05-5830

ORDER GRANTING PLAINTIFFS'  
MOTION FOR REMAND

This matter comes before the Court on Plaintiffs' Motion for Remand to State Court. After reviewing all materials submitted by the parties and relied upon for authority, the Court is fully informed and hereby grants Plaintiff's motion and remands this case to the state court.

**INTRODUCTION AND BACKGROUND**

The material facts are undisputed. The Plaintiffs served Defendant Allied Van Lines on November 2, 2005 with a summons and complaint. On December 8, 2005 counsel for Defendant sent written correspondence to Plaintiff indicating an intention to remove the action to federal court and making a written demand on Plaintiff, pursuant to Washington Superior Court Civil Rule 3 (CR 3), that the summons and complaint be filed with the Superior Court. On December 13, 2005 the

1 summons and complaint were filed in the Superior Court of Washington for Clark County. On  
2 December 28, 2005 the Defendant filed a Notice of Removal with this Court asserting original  
3 jurisdiction. This Notice of Removal was filed within 30 days of the filing of the summons and  
4 complaint, yet outside 30 days of service of the summons and complaint on the Defendant. The  
5 Plaintiff moves for remand to state court on the basis that the notice of removal is untimely.

#### 6 MOTION TO REMAND

7 The burden of establishing federal jurisdiction is on the party seeking removal, and the  
8 removal statute is strictly construed against removal jurisdiction. Prize Frize, Inc. v. Matrix (U.S.),  
9 Inc., 167 F.3d 1261, 1265 (9<sup>th</sup> Cir. 1999). The defendant has the burden of showing that it has  
10 complied with the procedural requirements for removal. Riggs v. Plaid Pantries, Inc., 233 F.Supp.2d  
11 1260, 1264 (D.Or., 2001); Schwartz v. FHP Int'l Corp., 947 F.Supp. 1354, 1360 (D.Ariz. 1996).  
12 There is a strong presumption against federal jurisdiction. If there is any doubt as to the existence of  
13 federal jurisdiction, the court should remand the matter to state court. Gas v. Miles, Inc., 980 F.2d  
14 564, 566 (9<sup>th</sup> Cir.1992).

15 Generally, “any civil action brought in a State court of which the district courts of the United  
16 States have original jurisdiction, may be removed by the defendant or the defendants, to the district  
17 court of the United States for the district and division embracing the place where such action is  
18 pending.” 28 U.S.C. § 1441(a); Matheson v. Progressive Speciality Ins. Co., 319 F.3d 1089, 1090  
19 (9<sup>th</sup> Cir. 2003). Furthermore, any civil action of which the district courts have federal question  
20 jurisdiction shall be removable without regard to the citizenship or residence of the parties. 28  
21 U.S.C. § 1441(b).

22 The procedures for removing an action from state to federal court are set forth in 28 U.S.C. §  
23 1446. The removing defendant must comply with these procedures in order to invoke federal  
24 removal jurisdiction. Removal is accomplished only when the notice of removal is filed with the  
25 district court and filed with the state court in which the action is pending. 28 U.S.C. § 1446(a) and

(d). A defendant seeking to remove a civil action to federal court must file a notice identifying the basis for removal “within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based ...” 28 U.S.C. § 1446(b). Pursuant to 28 U.S.C. § 1447(c), a plaintiff may challenge the propriety of removal based on procedural defects and move to remand a case to state court within 30 days after the filing of the notice of removal. See, N. Cal. Dist. Council of Laborers v. Pittsburgh-Des Moines Steel Co., 69 F.3d 1034, 1037 (9<sup>th</sup> Cir. 2003).

The Defendant contends removal is timely as notice was filed within 30 days of ‘filing’ the summons and complaint. The Plaintiff counters with the argument the notice is untimely because it was not filed with this Court within 30 days after ‘service of the summons and complaint’ on the Defendant. Both parties rely upon Murphy Bros., Inc. v. Maced. Pipe Stringing, Inc., 526 U.S. 344 (1999), wherein the Supreme Court addressed the issue of when the 30-day removal period begins to run.

In Murphy Brothers, plaintiff filed its complaint in Alabama state court and faxed a “courtesy copy” of the filed complaint to the defendant. After settlement negotiations failed, the plaintiff officially served the defendant pursuant to local law. The Supreme Court held that receipt of a courtesy copy of a complaint, unaccompanied by a summons, does not trigger a defendant's time to remove under § 1446(b). Id., at 347-48. As the Court explained: “An individual or entity named as a defendant is not obligated to engage in litigation unless notified of the action, and brought under a court's authority, by formal process. Accordingly, we hold that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, ‘through service or otherwise,’ after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service.” Id. In the course of its opinion, the Court reviewed the legislative history of § 1446(b), noting, inter alia, that prior to 1949 § 1446(b) provided that “[t]he petition for removal of a civil action or proceeding may be filed within twenty days after

1 commencement of the action or service of process, whichever is later.” Id. at 351. In 1949,  
2 Congress amended the statute because in states such as New York, most notably, service of the  
3 summons commenced the action, and such service could precede the filing of the complaint. To  
4 ensure that the defendant would have access to the complaint before commencement of the removal  
5 period, Congress in 1949 enacted the current version of § 1446(b).” Id.

6 Near the conclusion of its opinion, the Court summarized the four categories of various state  
7 provisions for service of the summons and the filing or service of the complaint. Id., at 254 (citing,  
8 Potter v. McCauley, 186 F.Supp. 146, 149 (D.Md. 1960)). The Court found that in each of the four  
9 categories, the defendant's period for removal will be no less than 30 days from service, and in some  
10 categories, it will be more than 30 days from service, depending on when the complaint is received.  
11 First, if the summons and complaint are served together, the 30-day period for removal runs at once.  
12 Second, if the defendant is served with the summons but the complaint is furnished to the defendant  
13 sometime after, the period for removal runs from the defendant's receipt of the complaint. Third, if  
14 the defendant is served with the summons and the complaint is filed in court, but under local rules,  
15 service of the complaint is not required, the removal period runs from the date the complaint is made  
16 available through filing. Finally, if the complaint is filed in court prior to any service, the removal  
17 period runs from the service of the summons. Id., at 354.

18 It appears from the plain language of Murphy Brothers, that the instant action falls within the  
19 first category. The summons and complaint were served together and the 30-day period for removal  
20 runs a once. Accordingly, Allied Van Lines’ notice of removal would be untimely.

21 Defendant, nonetheless contends that removal was timely because there was no lawsuit to  
22 remove within 30 days of the date of the service of the summons and complaint. Defendant removed  
23 the action within 30 days of the filing of the complaint with the state court. Defendant asserts that  
24 without prior filing with the court, Allied Van Lines did not receive a summons or complaint  
25 ‘brought under any court’s authority.’ Defendant contends that the unfiled summons and complaint

1 simply did not constitute ‘pleadings’ within the meaning of the removal statute. Allied Van Lines  
2 mere receipt of an un-filed ‘summons’ and ‘complaint’ can not trigger its time to remove the matter  
3 to federal court because such a ‘complaint’ or ‘summons’ is a legal fiction since it is not brought  
4 under a court’s authority and there is not a civil action to remove.

5 Defendant’s argument finds some support in the legislative history of the 1949 amendments  
6 to 28 U.S.C. § 1446(b). As noted in Murphy Brothers, “In some States suits are begun by the  
7 service of a summons or other process without the necessity of filing any pleading until later. As the  
8 section now stands, this places the defendant in the position of having to take steps to remove a suit  
9 to Federal court before he knows what the suit is about. As said section is herein proposed to be  
10 rewritten, a defendant is not required to file his petition for removal until 20 days [changed to 30  
11 days] after he has received (or it has been made available to him) a copy of *the initial pleading filed*  
12 *by the plaintiff* setting forth the claim upon which the suit is based and the relief prayed for. It is  
13 believed that this will meet the varying conditions of practice in all the States.” Id., at 352 (quoting  
14 S.Rep. No. 303, 81st Cong., 1st Sess., 6 (1949)).

15 This language suggests that the Congress assumed that a complaint is always filed prior to  
16 service of the complaint on the defendant. Equating filing of a complaint with commencement is the  
17 norm in civil practice. The general federal rule is that a lawsuit is commenced at a discrete moment  
18 in time: the filing of the original complaint in a court of competent jurisdiction. Bush v.  
19 Cheaptickets, Inc., 425 F.3d 683, 687 (9<sup>th</sup> Cir. 2005). Such is not the case in Washington.

20 A party may not remove a case to federal court before it has commenced in state court. Id.,  
21 at 686. The federal court must honor state court rules governing the commencement of civil actions  
22 when an action is first brought in state court and then removed to federal court. Id., at 686, 688;  
23 Cannon v. Kroger Co., 837 F.2d 660, 664 (4<sup>th</sup> Cir. 1988). Under Washington law, a civil action is  
24 commenced by service of a summons and complaint *or* by filing a complaint. RCW 4.28.020;  
25 Washington Superior Court Civil Rule 3(a); Seattle Seahawks, Inc. v. King County, 128 Wn.2d 915,

1 917, 913 P.2d 375, 376 (1996). Once an action is commenced by either service of summons and  
2 complaint or filing, the court is deemed to have acquired jurisdiction and to have control of all  
3 subsequent proceedings. Id. Thus, Washington law provides that an action is commenced with  
4 service of the summons and complaint. The complaint and summons were served on Allied Van  
5 Lines on November 2, 2005. According to state law this commenced the action and it was subject to  
6 removal. Although not filed with the court, service of the complaint on Defendant is consistent with  
7 the purpose of the 1949 amendments to 28 U.S.C. § 1446(b) of ensuring the defendant has access to  
8 the complaint before commencement of the removal period.

9       There is nothing in the removal statute that requires a state court filing as a prerequisite to  
10 filing a notice of removal. The notice provision of the removal statute provides that the defendant  
11 shall file with the district court a notice of removal containing a short and plain statement of the  
12 grounds for removal, together with a copy of all process, pleadings, and orders served upon such  
13 defendant in such action. 28 U.S.C. § 1446(a). Promptly after the filing of such notice of removal of  
14 a civil action the defendant shall give written notice thereof to all adverse parties and shall file a copy  
15 of the notice with the clerk of such State court, which shall effect the removal and the State court  
16 shall proceed no further unless and until the case is remanded. 28 U.S.C. § 1446(d).

17       This Court recognizes the potential difficulty arising where a notice of removal is filed with  
18 the clerk of the state court prior to the plaintiff paying the filing fee and filing the summons and  
19 complaint. Nonetheless, Washington law provides that the state court action has been commenced  
20 and the state court has acquired jurisdiction.

21       Washington law permits a defendant to demand the plaintiff file the summons and complaint  
22 with the appropriate state court. Washington Superior Court Civil Rule 3(a) provides that upon  
23 written demand by defendant, the plaintiff instituting the action shall pay the filing fee and file the  
24 summons and complaint within 14 days after service of the demand or the service shall be void.  
25 Nothing in the Washington court rules or the removal statute, 28 U.S.C. § 1446, prohibits a

1 defendant from providing service on the plaintiff a notice of removal together with a written demand  
2 that the summons and complaint be filed with the appropriate state court. Although not necessary to  
3 effectuate removal, use of such a procedure would ensure the state court's awareness of removal.

4 With due consideration of the rule that the removal statute is strictly construed against  
5 removal and that any doubts as to the existence of federal jurisdiction require remand, the Court  
6 finds the Defendant's notice of removal was untimely. 28 U.S.C. § 1446(b) provides the defendant  
7 must file a notice of removal "within 30 days after the receipt by the defendant, through service or  
8 otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or  
9 proceeding is based." The receipt of service of summons and the complaint initiates the running of  
10 the 30-day period in which to file notice of removal. Washington law provides that service of the  
11 summons and complaint commences a civil action. Accordingly, Defendant's notice of removal, filed  
12 after the expiration of 30 days from the date of service of summons and complaint on the Defendant,  
13 is untimely. The Court will grant Plaintiff's motion for remand to state court.

#### 14 CONCLUSION

15 For the reasons set forth above Plaintiff's Motion for Remand to State Court will be granted.


16 ACCORDINGLY,

17 IT IS ORDERED:

18 Plaintiff's Motion to Remand to State Court [Dkt. #5] is GRANTED.

19 DATED this 1<sup>st</sup> day of March, 2006.

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FRANKLIN D. BURGESS  
UNITED STATES DISTRICT JUDGE